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No. 00-832 and 00-843

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENT WORLDCOM, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the provisions of the Pole Attachments Act apply to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

LIST OF PARTIES AND AFFILIATES

The following are parties to the proceeding before this Court:

Federal Communications Commission, Petitioner

United States of America, Petitioner

National Cable Television Association, Petitioner

WorldCom, Inc., Respondent

Alabama Power Co., Respondent

American Electric Power Service Corp., Respondent

Atlantic City Electric Co., Respondent

Commonwealth Edison Co., Respondent

Delmarva Power & Light Co., Respondent

Duke Energy Corp., Respondent

Georgia Power Co., Respondent

Gulf Power Co., Respondent

Mississippi Power Co., Respondent

Potomac Electric Power Co., Respondent

Public Service Electric & Gas Co., Respondent

Savannah Electric Power Co., Respondent

Tampa Electric Co., Respondent

TXU Electric Co., Respondent

Virginia Electric & Power Co., Respondent

Pursuant to Rule 29.6 of the Rules of this Court, respondent WorldCom, Inc. ("WorldCom") states that it is a Georgia corporation which, along with wholly-owned subsidiaries, provides local and long distance telecommunications services and Internet services

domestically and internationally. WorldCom is a publicly-traded company on the Nasdaq National Market under the symbol "WCOM." WorldCom has no parent corporations, and no publicly held company owns 10% or more of WorldCom stock. WorldCom owns a controlling interest in Embratel Participacoes S.A., which issues shares to the public.

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BRIEF OF RESPONDENT WORLDCOM, INC. IN SUPPORT OF PETITIONERS

The first of the two questions presented here is whether the protections of the Pole Attachments Act (the "Act") apply to *cable systems* that simultaneously provide cable and Internet services over wires attached to utility poles. The Federal Communications Commission ("FCC" or "Commission") ruled that cable operators are entitled to pay the § 224(d) rate even if they provide Internet as well as cable services using these attachments. NCTA Pet. App. 62a-67a.[1] The court below and respondents take issue with the FCC's conclusion, primarily based on the limiting language in § 224(d)(3) that this subsection applies to the rate for any pole attachment used by cable operators "solely" to provide cable service.

WorldCom, Inc. ("WorldCom") respectfully submits this brief to urge the Court to make clear that its answer to this question does not necessarily resolve a separate question that the court below did not decide: whether the Act's protections apply to *telecommunications carriers* like WorldCom that simultaneously provide telecommunications and Internet services over wires attached to utility poles. Unlike § 224(d)(3), the subsection of the Act applicable to telecommunications carriers—§ 224(e)(1)—is *not* limited to rates for attachments used "solely" to provide telecommunications services.

INTEREST OF WORLDCOM

WorldCom provides both telecommunications and Internet services. Like all Internet service providers ("ISPs"), WorldCom uses telecommunications services as one element of its Internet services, and WorldCom also sells its telecommunications services to other ISPs for use in their Internet services. As a result, the wires that WorldCom uses

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[1] All cites to the Appendix are to the Appendix filed by petitioner National Cable Television Association, Inc. ("NCTA") in No. 00-832.

to provide telecommunications services carry Internet traffic along with voice and other data traffic. These wires are often attached to poles leased from utilities pursuant to the Act, and the regulated rate established by § 224(e) applies to the space on these poles leased by WorldCom. In these respects, WorldCom is typical of other telecommunications carriers: virtually all telecommunications carriers provide Internet as well as telecommunications services; virtually all use the same wires for both types of services; and because of the dramatic growth of the Internet, virtually all wires used to carry telecommunications traffic also carry Internet traffic.

Undoing the FCC's decision that the Act applies to attachments by telecommunications carriers used to provide Internet service would have severe consequences for carriers and their customers. Utilities would charge WorldCom and other telecommunications carriers substantially more, or even refuse to provide any access at all, for attachments for wires that carry both telecommunications and Internet traffic. As a result, placing these attachments outside the protection of the Act would substantially increase the costs of WorldCom and other carriers, and result in higher prices for consumers of both Internet services and telecommunications services.

This issue is of immediate concern to WorldCom and other telecommunications carriers. One respondent utility has contended that the decision below permits utilities to deny all rights under the Act to telecommunications carriers that provide Internet service in competition with utilities. The company now known as Dominion Virginia Power moved to dismiss an FCC complaint by a telecommunications carrier on the ground that the court below held that telecommunications carriers providing commingled telecommunications and Internet service have no right to attach their wires to utility poles, much less to pay a regulated rate for these attachments. Motion of Virginia Electric and Power Company to Dismiss Complaint for Lack of Jurisdiction, *In*

the Matter of Cavalier Telephone Co., LLC v. Virginia Elec. & Power Co., PA No. 99-005 (dated May 1, 2000).

OPINIONS BELOW

The opinion of the court of appeals in *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), is reprinted at NCTA Pet. App. 1a-37a. The court of appeals' unpublished orders denying the petitions for rehearing and rehearing *en banc* are reprinted at Pet. App 77a-96a. Relevant portions of the FCC's decision, *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777 (1998), are reprinted at NCTA Pet. App. 38a-68a.

JURISDICTION

The opinion of the court of appeals was issued on April 11, 2000. In orders dated September 12, 2000, the court of appeals denied timely petitions for rehearing or rehearing *en banc* by the FCC, NCTA, and WorldCom. The FCC, the United States, and NCTA timely petitioned for a writ of *certiorari* on November 22, 2000. This Court's jurisdiction to decide this case arises under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The Pole Attachments Act, 47 U.S.C. § 224 (1994 & Supp. IV 1998), as amended by § 703 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), is reproduced at NCTA Pet. App. 97a-102a.

STATEMENT OF THE CASE

WorldCom adopts the FCC's Statement of the Case.

SUMMARY OF ARGUMENT

If the Court agrees with the FCC that the protections of the Act apply to attachments for wires used to provide both *cable* and Internet services, it necessarily follows that the Act

applies to attachments for wires used to provide both *telecommunications* and Internet services. However, if the Court accepts the argument of the respondent utilities that the Commission lacks jurisdiction over pole attachments by *cable systems* providing Internet services, the Court should make clear that it is not deciding the separate question of whether the FCC lacks jurisdiction over attachments used by *telecommunications carriers* in connection with their Internet services.[2]

Regardless of the Court's decision with respect to commingled cable and Internet services, the FCC reasonably interpreted § 224(e) to give telecommunications carriers the right to pay the statutory rate for attachments used to provide wireline telecommunications services when the same wires are also used for non-telecommunications service, including Internet service. Overturning the FCC's construction of a statutory provision that does not unambiguously preclude this interpretation would violate the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

To show how different are the issues involving telecommunications carriers (and not to ask the Court to answer a question not presented), WorldCom explains why the language, structure, and purposes of the Act demonstrate that the Act applies to attachments by telecommunications carriers

[2] The decision below did not directly address this issue, although the utilities' position is inconsistent with the lower court's holding that the protections of the Act apply to any attachment used "at least in part" to provide wire communications, its broad definition of "telecommunications carrier," and its distinction of *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993). *See* pages 7-8 & n.6 below. Because one utility (mistakenly) took the position that the decision reversed the FCC on this ground (*see* pages 2-3 above), WorldCom asked the panel below to clarify that its decision did not limit the rights of telecommunications carriers under § 224(e). The panel declined WorldCom's request without explanation. NCTA Pet. App. 82a.

that also provide Internet services. *First*, the express language of § 224(e)(1) requires the FCC to regulate "the charges for pole attachments used by telecommunications carriers to provide telecommunications services," and a telecommunications carrier that provides Internet services is still a telecommunication carrier. *Second*, although the subsection specifically addressing cable systems applies to rates for attachments used "solely" to provide cable services, the subsection applicable to telecommunications carriers is *not* limited to rates for attachments used "solely" to provide telecommunications services. *Third*, interpreting § 224(e) to apply to attachments by telecommunications carriers that also provide Internet services promotes the purposes of the Act by enabling carriers to compete on an equal basis against utilities that themselves provide telecommunications and Internet services.

ARGUMENT

The language, structure, and purposes of the Act demonstrate that the Act applies to telecommunications carriers that provide Internet services, even if the Court were to determine that the Act does not apply to attachments by cable systems that provide Internet service.

1. The express language of § 224(e)(1) requires the FCC to regulate "the charges for pole attachments used by telecommunications carriers to provide telecommunications services," and § 224(a)(4) defines the term "pole attachment" to mean "any" attachment by a "provider of telecommunications service." A telecommunications carrier that also provides Internet services is still a telecommunications carrier and provider.[3] At a minimum, it was reasonable for the FCC

[3] The Communications Act defines "telecommunications carrier" to mean "any provider of telecommunications services," and the last sentence of this definitional provision expressly recognizes that a telecommunications carrier may provide non-telecommunications

to interpret the term "telecommunications carriers" in § 224(e)(1) to include firms that provide both telecommunications and Internet services.[4]

2. As the decision below recognized, the 1996 amendments to the Act treat attachments by telecommunications carriers separately from attachments by cable companies. As amended in 1996, the Act specifies that the § 224(d) rate is available for attachments by cable systems used "*solely* to provide cable service" (emphasis added) but that the § 224(e) rate is available for attachments by carriers

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services. *See* 47 U.S.C. § 153(44). The court below broadly defined telecommunications carriers to include companies that provide non-telecommunications services as well as telecommunications services: "the term 'telecommunications service providers' includes cable television companies that provide telecommunications services in addition to cable services." NCTA Pet. App. 11a n.14; *see* 47 U.S.C. § 224(d)(3) (cable systems that use pole attachments to provide any telecommunications service shall pay the § 224(e) rate when FCC regulations implementing § 224(e) become effective). The term is easily broad enough to include companies that provide Internet services in addition to telecommunications services.

[4] The utilities contend that the 1996 amendments to the Act exclude "facilities-based Internet service providers which are *not* cable companies or telecommunications carriers." *See* Brief in Opposition at 12 (emphasis added). Whatever the scope of any such exclusion, the broadband Internet access service provided by cable companies includes both a telecommunications service and an Internet service, *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000), so any cable system providing Internet service is necessarily also providing telecommunications service. As the FCC agrees, a cable system that provides a telecommunications service must pay the § 224(e) rate, not the rate that § 224(d) sets for attachments by cable systems used "solely" to provide cable services. *In re Amendment of Rules and Policies Governing Pole Attachments*, 15 F.C.C.R. 6453, 6457-58 ¶ 5 & nn. 28 and 31 (2000); *see* note 3 above. However, because neither the FCC nor the Eleventh Circuit reached this issue in the proceeding below, this Court need not decide it here, leaving the parties free to make their arguments in subsequent FCC proceedings.

used to provide telecommunications services.[5] By including the limiting word "solely" in the section applicable to cable companies, and omitting it from the section applicable to telecommunications carriers, Congress plainly intended to require utilities to charge the § 224(e) rate for attachments by any telecommunications carrier, even if that carrier does not provide "solely" telecommunication services. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation omitted, brackets in original).

Any other conclusion would create a conflict with *Texas Utilities.Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993), a decision that the court below distinguished based on the new "solely" language in § 224(d)(3). *See* NCTA Pet. App. 27a n.32. In *Texas Utilities*, the D.C. Circuit considered whether the pre-1996 version of the Act permitted cable systems to pay the regulated rate when they provide cable services commingled with non-cable services. As the court below explained, the D.C. Circuit approved deference "to the FCC's interpretation that co-mingled services were covered by section 224" because, prior to 1996, § 224 "did not specify the particular services of a cable television system that were entitled to a regulated rent." *See* NCTA Pet. App. 28a n.32.

According to the court below, the current situation with respect to cable services is different because the 1996 amendments "eliminate[d] the ambiguity at issue in" *Texas*

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[5] The court below observed, "The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing *solely* cable service and one for telecommunications carriers providing telecommunications service . . . ." NCTA Pet. App. 25a n.29 (emphasis added).

Utilities by adding a new § 224(d)(3) with the "solely to provide cable service" language. *See* NCTA Pet. App. 28a n.32. The utilities themselves distinguish *Texas Utilities* based on this new restrictive language. Brief in Opposition at 10-11. However, with respect to the application of § 224(e) to telecommunications services, the situation is the same as it was for cable services before 1996: like § 224(d)(3), § 224(e) was added by the 1996 amendments; but § 224(e) does *not* limit the type of services a telecommunications carrier may provide using an attachment, so long as it uses the attachment at least in part to provide telecommunications services over wires.[6] *Chevron* principles therefore require that the FCC's interpretation of § 224(e) be upheld, just as the D.C. Circuit correctly deferred to the FCC's interpretation of the pre-1996 § 224(d).

3. The FCC's conclusion is consistent with the purposes of the Act as well as its language. Indeed any contrary interpretation would frustrate the statutory purposes.

a. The utilities' interpretation would nullify a core purpose of the 1996 Act by giving utilities a major advantage over the telecommunications carriers with which they compete to provide telecommunications services. A utility's duty under § 224(e) to provide nondiscriminatory access to telecommunications carriers is triggered only if the utility provides wire communications using attachments to its poles or decides to allow others to do so. *See* 47 U.S.C. § 224(a)(1); NCTA Pet. App. 10a-11a & n.12. The 1996 amendments to the Act were intended to level the playing field between utilities and competing providers of telecommunications services for whom "utility poles afforded the only feasible

[6] The decision below acknowledged that the Act applies to any attachment used "in part" to provide wire communications. NCTA Pet. App. 20a-21a (citing § 224(a)(1)). An attachment used in part to provide telecommunications service and in part to provide Internet service is, by definition, used in part to provide a covered service.

means for stringing their wires." *See id.* at 10a. The statutory goal is "to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck facilities" in these circumstances. *Id.* at 23a (footnote omitted).

Allowing utilities to charge a monopoly price, or even deny access, to telecommunications carriers that also provide Internet service would give utilities a discriminatory advantage in the telecommunications business. This is especially true because, under the utilities' interpretation, a utility subject to this nondiscrimination obligation could charge a prohibitive price to any competing telecommunications carrier that provides Internet service only on an incidental basis – for example, if a telecommunications carrier uses the wires attached to poles 99% for telecommunications traffic and 1% for Internet traffic.[7] Like WorldCom, telecommunications carriers that provide telecommunications service over their own wires generally also provide Internet service.

b. The utilities' unfair advantage would be further magnified because utilities use their attachments to provide Internet service along with their telecommunications service in competition with firms that also offer the same two types of service. For example, Dominion Virginia Power, the utility seeking to deny attachment rights to

[7] Any rule that allowed telecommunications carriers to pay a regulated rate for attachments only if the wires attached to poles carried less than a specified percentage of Internet traffic would be unworkable as well as arbitrary because carriers are not able to measure the relative amount of Internet and non-Internet traffic on their wires. Indeed, telecommunications carriers generally have no way of knowing how a customer uses a telecommunications service—including whether the customer uses the service to carry Internet traffic or voice calls. The utilities agreed that a telecommunications carrier "does not have any obligation under these rules to monitor its customer's use of the telecommunications services provided." Reply of Petitioner Texas Utilities Elec. Co., at 13 (11th Cir. filed Jan. 27, 1999).

telecommunications carriers that also provide Internet services (*see* pages 2-3 above), itself provides Internet access over its telecommunications network, as demonstrated by its web site (http://www.vpsc.com). Utilities should not have a substantial advantage in competing against companies that seek to provide the same package of telecommunications and Internet services that the utilities themselves provide. The utilities' misinterpretation of § 224(e) would give telecommunications carriers a Hobson's choice: either give up the right to pay the regulated rate, or give up the ability to compete effectively against the utilities and other companies that provide both telecommunications and Internet services.

c. Allowing utilities to charge a monopoly price would violate the principle that the rate for attachments should not differ if the burden on the pole owner resulting from the attachments does not differ. The court below upheld the FCC's decision not to permit utilities to prevent telecommunications carriers from attaching dark fiber because "dark fibers place no more burden on a pole than do their host attachments." NCTA Pet. App. 31a. The equipment used to provide Internet service is not, and as a practical matter cannot be, attached to poles. This equipment consists of routers, switches, modems, and other sophisticated equipment that is situated inside in buildings, not attached outside to poles. No Internet-specific equipment is attached to poles. Whether the wires attached to utility poles carry Internet traffic as well as telecommunications traffic makes no difference whatever to the utility. The pole attachment is exactly the same whether or not the telecommunications carrier provides Internet service. Telecommunications carriers should be entitled to use the attachment to provide any service that does not impose additional costs on pole owners or raise safety, reliability, or other problems in violation of § 224(f)(2). The § 224(e) rate fully compensates pole owners for the use of their poles.

d. It is appropriate that telecommunications carriers have greater flexibility under § 224(e) than cable systems have under § 224(d) because the § 224(e) rate paid by telecommunications carriers is generally higher that the § 224(d) rate paid by cable companies. *See* NCTA Pet. App. 67a ¶ 34.

e. Finally, allowing telecommunications carriers to pay the § 224(e) rate if they provide Internet services along with telecommunications services is fully consistent with the principle that the 1996 Act does not give the FCC authority to regulate ISPs, the Internet, or Internet services with respect to pole attachments. *See* NCTA Pet. App. 25a, 28a, 31a n.34. Internet services are information services, not telecommunications services. *Compare* 47 U.S.C. § 153(20) (defining "information service") *with* § 153(46) (defining "telecommunications service"). Telecommunications services are an input to Internet services, so "ISPs use telecommunications to provide information service." *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000); *see In re Federal-State Joint Bd. on Universal Service*, 13 F.C.C.R. 11501, 11529 ¶ 57, 11532-33 ¶¶ 66-67 (1998) (ISPs use but do not provide telecommunications services).

When the government regulates the rate paid by a company that uses an attachment for telecommunications services and that also happens to provide Internet services over the same wires, it is regulating telecommunications services that happen to be used as an input into Internet services; it is not regulating the Internet or Internet services. The rate is regulated because the attachment is used to provide telecommunications services, not because these telecommunications services are in turn used in connection with Internet services. The FCC (like state utility commissions that regulate pole attachments pursuant to § 224(c)) regulates attachers as providers of telecommunications services, not as ISPs.

Just as the Act does not regulate the Internet when it protects telecommunications carriers that sell telecommunications services to unaffiliated ISP customers for use in their Internet services, it does not regulate the Internet when it protects telecommunications carriers that use the same wires for their own Internet services. The utilities agree that "[w]hen MCI uses an attachment to provide a telecommunications service—even to an Internet service provider—it should be entitled to the subsection (e) rates for the attachment." Reply of Petitioner Texas Utilities Electric Co., at 13 (11th Cir. filed Jan. 27, 1999).[8] It would be perverse if pole owners could charge only the § 224(e) rate when Internet service is provided by an ISP customer of a telecommunications carrier that attaches the wire that carries the Internet traffic, but pole owners could charge a higher rate, or deny access altogether, if the carrier provides the same Internet service itself over the same wires. It makes no difference to the pole owner whether the attaching carrier, or the carrier's ISP customers, or both, provide the Internet service. Because unaffiliated ISPs may purchase telecommunications services from telecommunications carriers that pay regulated rates for pole attachments, it is only reasonable to interpret the statute to afford telecommunications carriers the Act's protection if they use the same telecommunications services in the same

[8] As common carriers, telecommunications carriers cannot refuse to sell telecommunications services to ISPs merely because they are ISPs, any more than they can refuse to sell telecommunications services to any other type of customer engaged in a telecommunications-intensive business. *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999) (upholding FCC's interpretation of "telecommunications carrier" to mean common carrier). As a purchaser of telecommunications services, "an ISP appears ... no different from many businesses, such as pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies, which use a variety of communication services to provide their goods or services to their customers." *Bell Atlantic Tel. Cos.*, 206 F.3d at 7 (citation and quotation omitted).

way as their customers—as an ingredient for Internet services.

CONCLUSION

For the foregoing reasons, WorldCom respectfully requests that the Court avoid calling into question the FCC's interpretation of § 224(e) to allow telecommunications carriers to pay the regulated rate for attachments used at least in part to provide telecommunications services, regardless of whether the attached wires are also used for Internet services.

Respectfully submitted,

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